KNK DEVELOPMENT SDN BHD & ORS v. SUMBANGAN ANEKA SDN BHD

COURT OF APPEAL, KUCHING
HAMID SULTAN ABU BACKER JCA
ABANG ISKANDAR JCA
BADARIAH SAHAMID JCA
[CIVIL APPEAL NO: Q-02(NCVC)(W)-1525-07-2017]
26 SEPTEMBER 2018

CIVIL PROCEDURE: *Judgments and orders – Declaratory order – Land owner and developer entered into agreement to develop land – Land owner sought declaration from court that development agreement had expired and/or was terminated – Whether fit and proper case for granting of declaratory order*

CIVIL PROCEDURE: *Amendments – Document – Trial judge allowed amendment of document by looking at other documents and/or conduct of parties – Whether pure typographical error – Whether permissible*

The respondent, the owner of a piece of land, entered into a development agreement ('DA') with the first appellant, a developer, and later, a supplemental agreement ('SA'), for the commercial and residential development of the said land. The second and third appellants were the guarantors of the DA. The parties had agreed that the respondent was entitled to a certain number of units in the development ('the respondent's entitlements'), the completion of which was 36 months from the date of the approval of the amended building plan. The amended building plan was approved on 21 February 2013 and, according to the respondent, the 36 months completion period expired on 21 February 2016. The respondent granted the first appellant a grace period of six months to complete the respondent's entitlements, the expiry being 20 August 2016. The respondent claimed that, as the respondent's entitlements were not completed as at 20 August 2016, the first appellant failed to perform its obligation under the DA. The respondent subsequently issued a notice of intention to re-enter the land on 26 August 2016. The respondent then commenced an action against the appellants, at the High Court for, *inter alia*, a declaration that the DA had expired and/or was terminated on 22 August 2016. Refuting the respondent's claim, the appellants counterclaimed for losses and damages on the grounds that the respondent repudiated and/or unlawfully terminated the DA when it issued the notice of intention to re-enter the land. During trial, the Judicial Commissioner's ('JC') allowed an amendment to a document in the SA, by referring to the correspondence between the first appellant and the respondent. With the said amendment, the right to extend the completion of the respondent's entitlements was vested with the respondent and, as there was no extension granted, the respondent had validly terminated the DA and SA when it issued the notice to re-enter the land on 26 August 2016. The JC allowed the respondent's claim and dismissed the appellants' counterclaim. Hence, the present appeal.

Held (allowing appeal with costs)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) This was not a fit and proper case for the granting of a declaratory order. A declaration is a discretionary relief. It is only sought when the plaintiff does not know his right and needs a judicial determination. It is not available to a person who has already done a wrong, or taken a step, asserting his rights and trying to regularise his rights by seeking an order of court. As a general rule, the court ought not to entertain a declaratory prayer in such instances. If the respondent's claim was for breach of contract, the respondent should just set out the breach and seek damages or other reliefs; not a declaration. The High Court ought not to have granted the declaration. (paras 5 & 12)

(2) Seeking relief for breach of contract is a substantive right and recognised under the Contracts Act 1950. Seeking declaration is a discretionary relief and it falls under the Specific Relief Act 1950. The distinction in jurisprudence is not one of an apple and an orange but a marble and a pumpkin. (para 6)

(3) Allowing a document to be amended during the trial stage had led to travesty of justice. The amendment of pleadings is permissible at any stage of the proceedings but not the amendment of a document. If it is a pure typographical error, the court has the discretion to read the document, taking into consideration the typographical error, provided it would not lead to miscarriage of justice. A typographical error is one where you look at the document and say 'Yes, this is a typographical error'. You cannot say it is a typographical error by looking at the other documents and/or conduct of parties to say it was a typographical error. This was what the JC did and it was not permissible. (paras 7 & 12)

Bahasa Malaysia *Headnotes*

Responden, pemilik sebidang tanah, memeterai satu perjanjian pembangunan ('PP') dengan perayu pertama, pemaju, dan kemudian satu perjanjian tambahan ('PT'), demi pembangunan komersial dan kediaman tanah tersebut. Perayu kedua dan ketiga adalah penjamin PP tersebut. Pihak-pihak bersetuju agar responden berhak atas beberapa unit dalam pembangunan tersebut ('hak-hak responden'), yang tempoh siapnya ialah 36 bulan dari tarikh kelulusan pelan bangunan terpinda. Pelan bangunan terpinda diluluskan pada 21 Februari 2013 dan, menurut responden, tempoh siap 36 bulan tersebut tamat pada 21 Februari 2016. Responden memberi perayu pertama tempoh tangguh selama enam bulan untuk menyempurnakan hak-hak responden dan tarikh tamatnya ialah 20 Ogos 2016. Responden menyatakan bahawa, oleh kerana hak-hak responden tidak disempurnakan pada 20 Ogos 2016, perayu pertama gagal menjalankan kewajipannya bawah PP. Responden seterusnya mengeluarkan notis niat memasuki semula tanah tersebut pada 26 Ogos 2016. Responden kemudian memulakan satu tindakan

terhadap perayu-perayu, di Mahkamah Tinggi untuk, antara lain, satu pengisytiharan bahawa PP telah luput dan/atau ditamatkan pada 22 Ogos 2016. Membantah tuntutan responden, perayu-perayu menuntut balas untuk ganti rugi dan pampasan atas alasan responden mengingkari dan/atau, secara tidak sah, menamatkan PP apabila mengeluarkan notis niat memasuki semula tanah tersebut. Semasa perbicaraan, Pesuruhjaya Kehakiman ('PK') membenarkan pindaan pada satu dokumen dalam SA, dengan merujuk pada surat-menyurat antara perayu pertama dan responden. Dengan pindaan ini, hak melanjutkan penyempurnaan hak-hak responden terletak hak pada responden dan, oleh kerana tiada lanjutan masa yang dibenarkan, responden telah menamatkan PP dan PT secara sah apabila mengeluarkan notis kemasukan semula tanah pada 26 Ogos 2016. Pesuruhjaya Kehakiman membenarkan tuntutan responden dan menolak tuntutan balas perayu-perayu. Maka timbul rayuan ini.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Ini bukan kes yang sesuai untuk memberi perintah pengisytiharan. Pengisytiharan ialah satu relief budi bicara. Ini hanya dipohon apabila seorang plaintif tidak tahu haknya dan memerlukan pemutusan kehakiman. Pengisytiharan tidak tersedia buat seseorang yang sudah melakukan kesalahan, atau mengambil satu-satu langkah, menuntut hak-haknya dan cuba melunaskan hak-haknya dengan memohon satu perintah mahkamah. Sebagai satu peraturan am, mahkamah tidak sepatutnya mendengar permohonan pengisytiharan dalam hal-hal sedemikian. Jika tuntutan responden ialah untuk pelanggaran kontrak, responden sepatutnya menyatakan pelanggarannya dan memohon ganti rugi atau lain-lain relief; bukan satu pengisytiharan. Mahkamah Tinggi tidak sepatutnya memberikan pengisytiharan tersebut.

(2) Memohon relief untuk pelanggaran kontrak ialah satu hak substantif dan diiktiraf bawah Akta Kontrak 1950. Memohon pengisytiharan ialah relief budi bicara dan terangkum bawah Akta Relief Spesifik 1950. Perbezaan dalam jurisprudens bukan bagaikan epal dan oren bahkan seperti guli dan labu.

(3) Membenarkan satu-satu dokumen dipinda semasa peringkat perbicaraan menjerumus pada persendaan keadilan. Pindaan pliding dibenarkan pada mana-mana peringkat prosiding tetapi bukan pindaan pada dokumen. Jika kesilapan adalah kesilapan tipografi semata-mata, mahkamah mempunyai budi bicara membaca dokumen tersebut, mengambil kira kesilapan tipografi itu, dengan syarat ini tidak menjerumus pada kesilapan mahkamah. Satu kesilapan tipografi ialah sesuatu yang bila dokumen dibelek, seseorang akan berkata 'Ya, ini kesilapan tipografi'. Satu tipografi tidak boleh dikatakan satu kesilapan tipografi dengan merujuk pada lain-lain dokumen dan/atau tingkah laku pihak-pihak. Ini yang dilakukan oleh PK dan ini tidak dibenarkan.

A **Case(s) referred to:**

Ahmad Nadzrin Abd Halim & Anor v. Allianz General Insurance Company (M) Bhd. [2015] 9 CLJ 821 CA ***(refd)***

Amalan Tepat Sdn Bhd v. Panflex Sdn Bhd [2011] 7 CLJ 121 FC ***(refd)***

Ng Siew Wah & Ors v. MAA Holdings Sdn Bhd & Anor [1985] 1 LNS 37 FC ***(not foll)***

Zulkiflee Abdul Samad & Ors v. Segi Objektif (M) Sdn Bhd [2016] 1 LNS 1488 CA ***(refd)***

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For the appellants - Clement Wong, Then Siaw Lian & Lesley Ling; M/s Clement & Co Advocs

For the respondent - Lim Heng Choo & Steven Sia; M/s Lim & Lim Advocs

[Editor's note: For the High Court judgment, please see Sumbangan Aneka Sdn Bhd v. KNK Development Sdn Bhd & Ors [2018] 1 LNS 70 (overruled).]

C

Reported by Najib Tamby

JUDGMENT

Hamid Sultan Abu Backer JCA:

D **[1]** The appellants/defendants (developer and guarantors) appeal against the decision of the learned Judicial Commissioner who had allowed the respondent/plaintiff's (landowner) claim and dismissed the appellants' counterclaim.

Brief Observation

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[2] As we read the judgment of the learned Judicial Commissioner, we found some glaring jurisprudential errors on the face of the record. In our view, the learned Judicial Commissioner ought to have dismissed the plaintiff/respondent's claim and allowed the appellants' claim and ordered assessment of damages before the High Court for breach of contract.

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[3] In the instant case, the plaintiff had entered into the development area of the land in question by giving notice of intention to re-enter the land. Subsequent to that, the plaintiff had filed an action in court seeking declaratory prayers as well as other reliefs. The said prayers read as follows:

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(a) a declaration that the Development Agreement had expired on 22.8.2016 and/or the said Development Agreement was terminated on 22.8.2016;

(b) all sales of the 1st Defendant's entitled units under the Development Agreement to third parties be assigned to the Plaintiff;

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(c) alternatively, all the sales of the 1st Defendant's entitled units under the Development Agreement to third parties be set aside;

(d) further or in the alternative, all monies received by the 1st Defendant from third parties from the sales of the 1st Defendant's entitled units be paid to the Plaintiff;

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(e) the Plaintiff would enter and take possession of the said land with all the improvements;

(f) declaration that the 1st Defendant is not entitled to the Developer's entitled units under Development Agreement;

(g) loss and damages of RM7,809,484.56 against the 1st, 2nd and 3rd Defendants jointly or severally;

(h) differential sum of RM22,887.84

(i) interests;

(j) costs;

(k) Any other relief that this Honourable Court may deem fit and just to order.

[4] The prayers in the counterclaim *inter alia* read as follows:

14. The 1st Defendant repeat paragraph 1 to 12 of the Defence above and avers that by giving notice of intention to re-enter, the Plaintiff had wrongfully repudiated and/or unlawfully terminated the Development Agreement. As a result of which, the 1st Defendant had suffered loss and damages.

15. The 1st Defendant had incurred huge expenses and construction costs in the said Development.

16. The 1st Defendant avers that had the 1st Defendant completed the said Development, the 1st Defendant will make a profit of RM3,808,000.00 from the said Development.

17. Further, all the 1st Defendant's entitlements had been sold and pursuant to Sale and Purchase Agreement between the 1st Defendant and Purchasers, in the event the 1st Defendant failed or unable to complete and give vacant possession to the Purchasers, all the monies received by the 1st Defendant shall be refunded to the Purchasers and in addition, the 1st Defendant shall pay a like sum but not exceeding 10% of the purchase price to the Purchasers as pre-estimated liquidated damages and indemnify the purchasers with all other incidental loss suffered.

… .

[5] It is trite that declaration is a discretionary relief. It is only sought when the plaintiff does not know his right and needs a judicial determination. It is not available to a person who has already done a wrong or taken a step asserting his rights and trying to regularise his rights by seeking an order of court. The court as a general rule, ought not entertain a declaratory prayer in such instances. If the claim of the plaintiff is for breach of contract, then the plaintiff should just set out the breach and seek damages or other reliefs and not a declaration. In our view, the court ought not have granted the declaration. Support for the proposition is found in a number of cases. To name a few are as follows:

(i) In *Amalan Tepat Sdn Bhd v. Panflex Sdn Bhd* [2011] 7 CLJ 121, the Federal Court asserted:

> As declaration was the main prayer of the respondent, it is a rule of practice that before such relief is granted there must be evidential basis to do so. Courts are very slow in granting declaratory prayer without any evidence and argument advanced. It is a rule of practice that 'the court does not make declarations of right either on admissions or in default of pleading' (*Gan Boon Kyee v. Yap Hong Sin & Anor; Patten v. Burke Publishing Co*).

(ii) In *Zulkiflee Abdul Samad & Ors v. Segi Objektif (M) Sdn Bhd* [2016] 1 LNS 1488, the Court of Appeal observed:

> In the instant case, the plaintiffs are seeking various declaratory reliefs. Declaratory relief is discretionary in nature. To succeed in declaratory reliefs, the plaintiffs must come with clean hands as well as there should not be delay or collateral purpose. The findings of the learned judge on these issues were detrimental to the plaintiffs and would deprive them of the prayers they sought. It is well established that:
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> (i) declaratory prayers are discretionary in nature and granted sparingly and judicially with regard to all the circumstances of the case and that a court will not make a declaratory judgment where the question raised is purely academic or to cause delay;
>
> (ii) to qualify for declaration, the plaintiff must not only show it is not inequitable for the court to grant but also that it is not contrary to the accepted principle upon which the court exercises its discretion;
>
> (iii) declaratory prayers ought not be granted if all necessary and interested parties are not before the court. [See *Low Kum Yoon v. The Kim Huah* [1979] 1 MLJ 83; *Tengku Jaffar bin Tengku Ahmad v. Karpal Singh* [1993] 3 MLJ 156; *Sabu Development Sdn Bhd v. Kelik Anak Bayel* [2007] 9 MLJ 475]. In *Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham (Executor of the Estate of Loo Cheng Ghee)* [1998] 4 CLJ 812; [1999] 2 AMR 1235].

(iii) In *Ahmad Nadzrin Abd Halim & Anor v. Allianz General Insurance Company (M) Bhd.* [2015] 9 CLJ 821; [2015] 6 MLJ 223, the Court of Appeal observed:

> It is trite that the declaratory relief are discretionary relief. If the court finds it will be unjust on the facts and circumstances to grant the declaration it may refuse the declaration.

[6] Seeking relief for breach of contract is a substantive right and recognised under the Contracts Act 1950. Seeking declaration is a discretionary relief and it falls under the Specific Relief Act 1950. The distinction in jurisprudence is not one of an apple and orange but a marble and pumpkin. The court is not obliged to grant a discretionary prayer. We will elaborate on this jurisprudence further in our judgment.

[7] The facts of this case will also show that the court should not have granted the declaratory prayers as the contract that the plaintiffs were relying on was disputed in material form in respect of a particular clause where it was in favour of the defendant. The plaintiffs, without obtaining rectification of the particular clause, had only at the time of giving evidence, approached the court to say it was a typo error. The court went into great length to justify it was a typo error creating great disadvantage to the defendant, thereby compromising the integrity of the decision-making process. In fact, the law is clear to say that when a person who approaches the court seeking for declaratory relief, he must have the documents as well as evidence in order and cannot amend a document by oral evidence. That too, at the trial stage when such amendment will totally destroy the defendant's case. *In this context, we must say that the amendment of pleadings is permissible at any stage of the proceeding but not amendment of a document though we will agree that if it is a pure typographical error in the document, the court has a discretion to read the document, taking into consideration the typo error provided it will not lead to miscarriage of justice.* Typo error is one where you look at the document and say 'ah yes lah, this is a typo error'. You cannot say it is a typo error by looking at other documents and/or conduct of parties to say it was a typo error. This is what the learned Judicial Commissioner did, and in our view it is not permissible. (emphasis added).

Brief Facts And Finding Of The Learned Judicial Commissioner

[8] The learned Judicial Commissioner had set out the facts and arguments of the parties in great detail. In consequence, the judgment must be read together with our judgment to appreciate the issues in the right perspective.

[9] The brief facts of the case and finding of the learned judge in a rudimentary manner is set out below:

1. The Plaintiff was at all material times, the landowner of the land held under Lot 532, Block 9, Bukau Sadong Land District ("the Land"). The Plaintiff and the 1st Defendant had on 18.10.2012 entered into a Development Agreement dated 18.10.2012 ("the DA") for the commercial and residential development of the Land subject to the terms and conditions stated therein. The Plaintiff and the 1st Defendant had further on 24.09.2014 entered into a Supplemental Agreement ("the SA") in respect of the said development.

2. The 2nd and 3rd Defendants were the guarantors pursuant to a Performance Guarantee dated 18.10.2012 ("the PG") to ensure the full performance of the DA.

3. The Plaintiff claimed against the Defendants for, *inter alia*, a declaration that the DA had expired on 22.08.2016 and/ or that the DA was terminated on 22.08.2016.

4. The Defendants disputed the Plaintiff's claim and counterclaimed alleging that the Plaintiff had repudiated and/ or unlawfully terminated the DA when it caused to be issued the notice of intention to re-enter the Land on 26.08.2016. The Defendants also claimed for loss and damages arising from the alleged repudiation and/or unlawful termination.

5. The main issue before the Court was whether the DA had expired and/or lawfully terminated on 22.08.2016 as contended by the Plaintiff or whether the Plaintiff had repudiated and/ or unlawfully terminated the DA when it caused the notice of intention to re-enter the Land to be issued on 26.08.2016.

6. After a full trial and on 30.06.2017, this Court gave Judgment in favour of the Plaintiff ("the Judgment"), the plaintiff's claim was allowed and the 1st defendant's counterclaim was dismissed with costs.

Finding(s) Of The Learned High Court Judge

1. The 1st issue before the court is; 'who had the right to extend the completion date under the SA'.

2. Court found no merits in the contention by the defendants that the SA was a variation of the DA on 2 grounds;

   a. The 36 months' time frame stated in the Power of Attorney dated 18.10.2012 was to be from the date of the DA. The completion of the Plaintiffs Entitlements was to be within 36 months from the date of the approval of the amended building plans, i.e. some 4 months after the DA was executed. Thus, any amendment or variation to the Power of Attorney would not have had any effect on the terms of the DA itself. There was no significance as to the deletion of the 36 months' time frame in the Power of Attorney in as far as the rights of the parties under the DA were concerned.

   b. Secondly, apart from the wordings of Clause 1.1, nowhere in the SA was it mentioned that the Plaintiff's rights to terminate the DA had been taken away, amended and/or varied. The Recitals make no mention of it. In fact, Clause 1.1 of the SA further expressly retained the right of the Plaintiff to terminate the DA.

3. The right to terminate the DA was still vested with the Plaintiff by Clause 1.1 of the SA, court of a view that, it did not make any commercial or common sense at all that the right to extend the time for completion of the Plaintiffs Entitlements would be vested in the 1st Defendant.

4. Court agreed with the plaintiffs contention that, the word "Developer" in the phrase "(unless extended by the Developer)" in Clause 1.1 of the SA was a typographical error in the drafting of the agreement. Typographical errors in formal documents are not after

all totally alien to contractual disputes. Thus court held that the right of extension under Clause 1.1 of the SA was not with vested with the 1st Defendant but with the Plaintiff.

5. Second issue is 'on the termination or expiry of the DA'. Court's request for a clarification on this issue, the learned counsel for the Plaintiff submitted that the DA and SA by virtue of their expiry would have been terminated by the Plaintiff's advocates' letter to retake possession of the Land with improvements. Hence, the Plaintiff had evinced an intention to put an end to the DA and SA, the effect of which was to be construed as a termination in compliance with Clause 1.1(a) of the SA.

6. On the Defendants' part, it was pleaded that the Plaintiff's notice to re-enter the Land dated 26.08.2016, amounted to a wrongful repudiation and/ or unlawful termination of the DA. However, upon the Court's query on whether there was a termination pursuant to Clause 12 of the DA and Clause 1.1 of the SA, the Defendants contended that the said provisions required a positive act on the part of the Plaintiff to terminate the DA and SA which the Plaintiff had consistently denied. As such, the Defendants further contended that the Plaintiff was not entitled to claim the damages as prayed for but only for the pre-liquidated damages for the extension of time under Clause 12 of the DA and nothing more.

7. Court found that when the Plaintiff caused the Notice of Intention to re-enter the Land dated 26.08.2016 to be issued, although not expressly stated therein, the effect of it was that the Plaintiff had terminated the DA and SA. The Plaintiff had already informed the 1st Defendant that they would not agree to a further extension, the 1st Defendant was made fully aware that the agreements would not be extended and thus, were put to an end. There was no necessity for a further positive act on the part of the Plaintiff as the DA and SA did not dictate how or in what manner the termination should be made.

8. Furthermore, the Defendants' counterclaim was premised on the allegation that the Plaintiff had repudiated and/or unlawfully terminated the DA and SA. Having found that the Plaintiff was vested with the right to extend the DA under Clause 1.1 of the SA and there being no extension of time granted by the Plaintiff by the expiry of the 6 months grace period on 20.08.2016, Court therefore found that the Plaintiff had validly terminated the DA and SA when it caused the Notice of Intention to re-enter the Land dated 26.08.2016 to be issued. Consequently, the Defendants' counterclaim must therefore fail.

9. 3rd issue is 'on the liability of the 2nd and 3rd Defendants'. The 2nd and 3rd Defendants were guarantors pursuant to the PG entered between them and the Plaintiff to ensure the full performance of the DA. Since court had already held that the Plaintiff had validly terminated the DA and SA upon the failure of the 1st Defendant to complete the Plaintiff's Entitlements within the time prescribed

A therein, consequently, the contentions by the 2nd and 3rd Defendants that they have been discharged from the PG must also necessarily fail.

10. On the loss and damages claimed by the Plaintiff. Court held that, the plaintiff had proven its loss thus court allowed the plaintiff claim for loss and damages in prayer (a), (d) in the sum of RM17,442,330.00, (e), (f), (g) with the sum amended to RM7,806,485.10, (h) and (j) with costs of RM80,000.00.

[10] The facts of the case and the convoluted arguments in this case is not relevant. The learned Judicial Commissioner has rightly identified the issues as follows:

> Although there was no Statement of Agreed Issues to be tried filed in this action, based on the pleadings and contentions by the parties, the main issue before the Court was whether the DA had expired and/ or lawfully terminated on 22.08.2016 as contended by the Plaintiff or whether the Plaintiff had repudiated and/ or unlawfully terminated the DA when it caused the notice of intention to re-enter the Land to be issued on 26.08.2016.

[11] In the instant case, the learned Judicial Commissioner's focus was on the development agreement. In relation to the supplementary agreement, the learned Judicial Commissioner allowed an amendment to a document which the appellant complains. The complaint of the appellant in the memorandum of appeal read as follows:

1. The Learned High Court Judge erred in law and in fact when Her Ladyship failed to judicially appreciate that there was no valid and effective communication of termination or rescission by the Respondent to the 1st Appellant and failed to take into account the legal principles of termination and had therefore erred in ruling that the Development Agreement dated 18.10.2012 ("Development Agreement") was terminated on 22.8.2016.

2. The Learned High Court Judge erred in law and in fact when Her Ladyship ruled that the Notice of Intention to re-enter dated 26.8.2016 should be taken as an effective termination of the Development Agreement by the Respondent against the Appellants, based on the Submission from the Bar by the Respondent's counsel, contradicting with the testimony of the Plaintiff's witness (PW2) and further contradicting with Her Ladyship's own ruling that the date of termination is 22.8.2016, which is also not consistent with the date of the Notice of Intention to re-enter dated 26.8.2016.

3. The Learned High Court Judge erred in law and in fact when Her Ladyship failed to judicially appreciate that Clause 1.1 of the Supplemental Agreement dated 24.9.2014 ("Supplemental Agreement") has replaced or varied Clause 12.1 of the Development Agreement AND Clause 1.1 of the Supplemental Agreement should

be read together with Clause 12.2 of the Development Agreement whereby the 1st Appellant is entitled to a grace period of six (6) months, which was not granted although requested, when the alleged termination or expiry took place.

4. The Learned High Court Judge erred in law and in fact when Her Ladyship failed to judicially appreciate that the Supplemental Agreement had in fact varied or extended the date of completion of the Development Agreement under Clause 12.1 from the original completion date of 21.2.2016 to 20.8.2016 by way of clause 1.1 of the Supplemental Agreement AND therefore the date of 20.8.2016 was due to the variation under Clause 1.1 of the Supplemental Agreement and NOT pursuant to extension of six (6) months grace period under Clause 12.2 of the Development Agreement.

   4.1 The Learned High Court Judge erred in law and in fact when Her Ladyship allowed or granted pre-estimated liquidated damages to the Respondent for extension of six (6) months grace period granted under Clause 12.2 of the Development Agreement, when there was NO such extension of time at all materials time as stated above.

   4.2 The Learned High Court Judge also erred in law and in fact by ruling that the Development Agreement has expired on 22.8.2016 and failed to take into account the 1st Appellant's entitlement of six (6) months grace period under Clause 12.2 of the Development Agreement.

5. In alternative to paragraphs 1 to 4 above, the Learned High Court Judge erred in law and in fact when Her Ladyship failed to take a holistic approach in granting damages to the Respondent by granting excessive and unjust amount damages to the Respondent by allowing prayers (d), (f) and (g) of the Statement of Claim simultaneously, which should be allowed in alternate and NOT in conjunction, as such findings would result in double remedies AND unjust enrichment to the Respondent, to the contrary of the cornerstone of the doctrine of restitution under the law of contract.

   5.1 The Learned High Court Judge erred in law and in fact when Her Ladyship applied the doctrine of unjust enrichment in granting prayers (d) and (f) without taking into account the compensatory damages under prayer (g) AND forfeiture of all improvements of which all costs and expenses for improvements which were solely borne by the 1st Appellant in the pleaded sum of RM15,093,970.00, enjoyed by the Respondent.

   5.2 The Learned High Court Judge further erred in law and in fact when Her Ladyship wrongly granted prayer (d) of the Statement of Claim by allowing the Respondent's claim for ALL monies received by the 1st Appellant from third parties from the sales of the 1st Appellant's entitled units including monies that had been received before the date of alleged termination, overlooking the pertinent word of "thereafter"

A provided under 1.1(a)(v) of Supplemental Agreement which only entitles the Respondent to proceeds AFTER or POST termination and NOT existing proceeds which had been received by the 1st Appellant before the alleged termination.

6. The Learned High Court Judge erred in law and in fact by B dismissing the 1st Appellant's counterclaim when there was no lawful termination and failed to take into account all losses and damages suffered and will be suffered by the 1st Appellants due to the Respondent's wrongful conduct of premature termination on the progress of the Development Agreement AND the delay thereby caused.

C **[12]** We have read the appeal records and the able submissions of the parties in detail. After giving much consideration to the respondent's submission, we take the view that the appeal should be allowed. Our reasons *inter alia* are as follows:

D (a) As we have said earlier, this is not a fit and proper case for granting a declaratory order. In addition, allowing a document to be amended during the trial stage had led to travesty of justice. Further, the conduct of the plaintiff as a whole is oppressive in nature.

(b) The learned trial judge had relied heavily on the case of *Ng Siew Wah* E *& Ors v. MAA Holdings Sdn Bhd & Anor* [1985] 1 LNS 37; [1985] 2 MLJ 332 where Mohamed Azmi SCJ had this to say:

> But the question still arises, what is the true construction of the contract? Now it is a great mistake if it is supposed that even a court of law cannot correct a mistake, or error, on the face of an F instrument: there is no magic in words. If you find a clear mistake, and it admits of no other construction, a court of law, as well as a court of equity, without impugning any doctrine about correcting those things which can only be shown by parol evidence to be mistakes - without, I say, going into those cases at all, both courts of law and equity may correct an obvious mistake on the face of G an instrument without the slightest difficulty ... There was no question about going contrary to the intention. It was a question of construction. It struck everybody who looked on it that it was a clear error.

(c) We do not think the principles stated in *Nittan*'s case applies to the H factual matrix of this case for reasons we have stated earlier. Clear mistake means, there is no dispute by both parties and if there is a dispute, any reasonable tribunal will say it is indeed a clear mistake. In the instant case, the defendants' defence would have collapsed if the purported mistake is treated as error. The issue of rectification on the factual matrix of the case is substantive in nature. When rectification is I in issue to anchor a substantive claim or defence, we do not think the principle stated in *Ng Siew Wah* will apply.

[13] We take the view that the learned Judicial Commissioner should have dismissed the plaintiff's claim and allowed the defendants' counterclaim limited to breach of contract more so when there are also third party interest, etc involved. Our view is also reflected in the submission of the appellant which read as follows:

> We conclude that the project has been put to abeyance ever since the dispute arose back in August 2016 and this is to the detriment of the 1st Appellant and the *bona fide* purchasers. Should this Honourable Court set aside the Order made by the Learned Judicial Commissioner and ruled that the termination was unlawful by reason of (1) absence of termination or (2) premature termination or (3) no total failure of consideration, and since the unlawful termination has been accepted by the 1st Appellant, we humbly pray for this Honourable Court to make the following consequential orders on the quantum of damages in favour of the 1st Appellant:
>
> (i) Damages in the sum of RM14,679,045.89 being the construction costs incurred by the 1st Appellant;
>
> (ii) Damages in the sum of RM1,741,850.00, being the foreseeable damages in compensating the *bona fide* purchasers due to deadlock of the Project resulted from the unlawful termination;
>
> (iii) Damages in the sum of RM5,052.16, being the debt due and owing for the redemption sum; and
>
> (iv) post-judgment interests of 5% of (i) and (ii) above from the date of judgment until the date of full settlement (note that pre-judgment interests were not prayed for).
>
> Alternatively, in the event this Honourable Court is not minded for the assessment of damages to be carried out in relation to the 1st Appellant's losses and damages arising from the unlawful termination, we pray for the damages to be assessed before the High Court.

[14] For reasons stated above, the appeal is allowed with costs of RM80,000 for here and below taking into consideration that the High Court had granted costs to the respondent in the sum of RM80,000. The defendants' loss and damage is fixed for assessment before the High Court, for which they are entitled to costs related to assessment.

We hereby order so.